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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 78

HERBERT W. GOLDBLATT, *et al.*,

Appellants,

—against—

TOWN OF HEMPSTEAD,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF OF APPELLANTS

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Statement

Considering the appellee's brief as a whole and before replying more specifically thereto, we find two main contentions submitted in support of the constitutionality of Ordinance No. 16.

First, appellee contends that the Ordinance does *not* prohibit all further underwater excavation on appellants' property. This contention is factually erroneous (see our main brief, pp. 12-18 and Point I of this reply brief).

Second, based on the erroneous assumption that Ordinance No. 16 is not prohibitory but only regulatory, appellee argues the applicability of the undisputed rule of presumption of constitutionality in the enactment of *regu-*

latory legislation; and appellee then goes on to argue that appellants failed to overcome such presumption of constitutionality, which appellee assumes to exist in our case (see pp. 12-16 *infra*).

The foregoing main points were adopted in the majority opinion of the Court of Appeals (R. 199).

The presumption of constitutionality given to legislation which provides reasonable *regulations* in the conduct of a business is not applicable in our case because sections 4(h) and (j) of Ordinance No. 16 are *not* regulatory of excavation methods but prohibit *all* underwater excavation on appellants' property.

To state the matter in another way: even if we assume, *arguendo*, the major premise of appellee *viz*: that a presumption of constitutionality applies to Ordinance No. 16, that presumption is overcome and no longer exists, when it is shown—as it was in our case—that the "regulation goes too far" and becomes prohibition or "a taking" (*Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. at p. 416). We find not only a total prohibition of excavating, provided for in sections 4(h) and (j) (see Point I, *infra*) but we have a judgment in prior litigation between the same parties, which directly holds that the right of appellants to excavate under water on *all* of their property constitutes a legally protected "non-conforming use" of appellants' property. The judgment in that litigation (Exhibit 3 of our main brief), dated April 5, 1956, was, in effect, overruled and reversed by sections 4(h) and (j) of the 1958 amendment of Ordinance No. 16.*

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* Whatever the defense be in form (Appellee's brief, Point II), the substance of the matter is that the 1958 Ordinance directly and unqualifiedly prohibits exactly what the 1956 judgment permitted, *to wit*: excavating under water on "the entire premises" of appellants.

A major part of appellee's brief is devoted to an attempted showing of an alleged failure of appellants to overcome the presumption of constitutionality which is accorded reasonable, regulatory legislation. The incontrovertible fact (shown in our main brief pp. 12-18 and pp. 4-7 *infra*) that the Ordinance *prohibits* underwater excavation and wipes out appellants' legal, vested rights of their nonconforming use of underwater excavation, constitutes all the proof necessary to overcome any presumption of constitutionality and to demonstrate a "taking", in violation of the due process clause.

The fact that appellee has devoted so much of its brief to argumentation that there is no prohibition of excavation is an implied admission that if the Ordinance does provide for such prohibition, it would be unconstitutional as a taking without compensation.

Finally in this summary resumé of appellee's brief we consider appellee's attempt to substitute argument, in place of evidence, to establish that appellants' excavating business constitutes a nuisance in order to sustain the constitutionality of the Ordinance. Appellee tries to draw a word picture of danger or nuisance (without the benefit of proof) although in one place (brief p. 11) it disclaims any intention to contend that "the business of excavation of sand and gravel is *per se* evil" and states that "sand pit operations are not intrinsically evil".

We consider, at greater length hereafter, appellee's resort to judicial knowledge of (1) an alleged unreported drowning which took place before the appellee-Town itself required that appellants' property be fenced and (2) of alleged drownings "in other pits", the facts of which are not before this Court. At this point we limit our observation to the fact that appellee's resort to judicial knowledge demonstrates that appellee recognizes that in order to

sustain the constitutionality of prohibitory and confiscatory legislation, where nuisance is present,* appellee would have had to prove that appellants' excavating activities did constitute such nuisance. No such proof was supplied. To the contrary, appellants' activities did not constitute a nuisance.

We now consider appellee's brief in greater detail.

POINT I

Appellee's theory that the 1958 Amendment of Ordinance No. 16 is not prohibitory but only regulatory is fallacious. The very terms of sections 4(h) and (j) of the Ordinance prohibit all future excavating under water on appellants' property and require the refilling of 20 acres under water theretofore for over 30 years. The undisputed evidence is that section 4(j) requires that 1,000,000 cubic yards of "clean non-burnable fill" be supplied by appellants to fill the excavation on these 20 acres.

Recognizing the rule of law that "if regulation goes too far it will be recognized as a taking" and therefore in violation of the due process clause of the 14th Amendment (*Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. at p. 416) appellee has sought to avoid the application of this principle by arguing that Ordinance No. 16 is not a prohibition of excavation but only regulation, constituting "minimal safety standards" (appellee's brief p. 11).** In *Arverne Bay Con-*

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* As we pointed out in our main brief (pp. 23, 24) the "extreme cases" (328 U. S. at p. 83) where the constitutionality of prohibitory legislation of a business is found i.e. where nuisance is proved, would not be applicable in our case which involves the use of the land itself. See *Hadacheck* v. *Los Angeles*, 239 U. S. 394, 410-412 and see brief of *Amicus Curiae* in our case, pp. 15-26.

** This description of "minimal safety standards" was also used in appellee's brief in the Court of Appeals and the language was adopted, *in haec verba*, in the majority opinion of Judge Burke (R. 200).

struction Company v. *Thatcher*, 278 N. Y. 222, 226, the Court pointed out that an unconstitutional "taking" of property occurs when an ordinance precludes "its use for any purpose for which it is reasonably adapted". The Court stated (278 N. Y. at 232):

> "An ordinance which *permanently* so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property. The only substantial difference, in such case, between restriction and actual taking, is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden." (Emphasis in original.)

In our case the "taking" is of the first type described in the *Arverne* case *viz*: a restriction of "any reasonable purpose" or use "permanently", where the property owner nevertheless remains "subject to the burden of payment of taxation". There is no other use—and appellee has not been able to suggest one—of appellants' 20 acres under water, other than underwater dredging or excavating; and since the Ordinance (section 4(j)) requires the refilling of the entire area under water, the only use (i.e. underwater dredging) has been eliminated. We noted in our main brief (p. 18) that an alternative use suggested by appellee in its briefs below, to wit: swimming and boating, was (a) impossible because of the Ordinance's mandate of refilling and (b) was contrary to appellee's unproven theory that the water on appellants' land is dangerous *per se*. Appellee has not repeated its suggestion of boating and swimming in this Court and has made no suggestion of any use, other than that of underwater excavating—which is proscribed by the Ordinance.

We considered the prohibitory nature of sections 4(h) and (j) of the Ordinance in our main brief (pp. 12-14).

Since appellee's contention that the Ordinance does not prohibit underwater excavating, constitutes the main prop of appellee's argument in support of constitutionality of the Ordinance, we pray this Court's indulgence to review again the provisions of the Ordinance, as applied to the undisputed facts in our case, which demonstrates that there is no question about the ultimate fact that we have here a case of confiscation and not "merely • • • certain minimal safety standards" (brief p. 11).

Section 4(h), *by its very terms,* prohibits all excavation "below two feet *above* the maximum ground water level at the site." Since appellants' excavation is now *admittedly*—and has been for 30 years—25 feet *below* maximum ground water level, there can be no question about the fact that appellants cannot continue their operations without directly violating the express provisions of section 4(h).

To put the matter another way: section 4(h) directly forbids all excavation below "two feet *above*" water level. Appellants' excavation is admittedly 25 feet (and as appellee points out (brief, p. 3), as much as 48 feet "in some places") *below* water level. The judgment appealed from (R. 14) recognizes this situation in providing that "the pit has been excavated substantially beyond points 2 feet above the ground water levels at the site" and correctly concludes that this constitutes one of the "violations of the said Ordinance No. 16".

The judgment (R. 13) enjoins further underwater dredging until appellants "shall have corrected" this violation. The *only* way to "correct" this "violation" of excavating below water is *not* to excavate below water. That is nothing more or less than total prohibition. The statement in the

majority opinion (R. 200) that "neither the injunction granted nor the ordinance proscribes any future excavation" is therefore unsupportable and is directly contrary to the very language of sections 4(h) and (j), as applied to the undisputed facts in our case.

We now consider how appellee has sought to avoid the clear language of sections 4(h) and (j).

First, appellee argues that there may not be any more sand and gravel to excavate from appellants' premises because excavation has been going on for 30 years. The answer to this suggestion is the direct and uncontradicted testimony that appellants have "not exhausted the available deposits" (R. 86). There was also testimony (R. 86) that as of the time of trial appellants were "actively mining sand and gravel at the premises". Only because of the judgment of injunction appealed from (R. 12-14) has there been a cessation of excavation activities. Furthermore, appellee's own statement (brief, p. 3) that the excavation under water (covering 20 acres of appellants' property) "is as deep as 48 feet . . . in some places", with "an average depth of about 25 feet", shows that there are some 23 feet of excavation to be removed over the area of 20 acres now under water (see appellee's exhibit 3).

Second, appellee argues (brief, p. 9) that appellants did not prove the amount of their investment in their excavation business. This is strange argument in view of the fact that appellee objected to the proof which appellants offered (R. 119) of the extent of their investment. Even the limited proof of investment permitted by the trial court showed a substantial figure of $66,000 (R. 119). Furthermore, as we pointed out in our main brief (pp. 21, 22) there was admitted in evidence the record of the previous litigation (appellants' exhibit I) which showed that the improvements and capital investment of equipment appellants

used in their excavation work totalled "approximately $241,000".

Thirdly, in order to overcome the conclusion that appellants' property has been taken without payment, appellee has argued that there *may* be other profitable uses of appellants' property. We anticipated this argument in our main brief (p. 18). We have also noted, *supra*, p. 5, that appellee cannot suggest any use of 20 acres under water, which the Ordinance requires appellants to refill.

Fourthly, we come to the argument, also anticipated in our main brief (pp. 16, 17), that there has been no confiscation or taking of appellants' property because 18 of the 38 acres owned by appellants is not yet underwater and may be excavated. At the risk of repeating, we reply:

(1) The requirement of section 4(h) limiting excavation to a point "2 feet *above*" water level means that there is very little to excavate on these 18 acres because this acreage is close to water level, as shown on appellee's exhibit 3.

(2) These 18 acres are used in conjunction with appellants' underwater hydraulic operations on the other 20 acres. The photographic exhibits (exhibits 6A-6U) show the location of dredging equipment, trucks and other equipment on these 18 acres.

(3) Even if it be assumed, for purposes of argument only, that 18 acres have not been taken that would not change the fact that the 20 acres have been taken. This argument that "approximately 18 acres are [still] available for excavation" was adopted in the majority opinion (R. 200).

Finally, in reply to the contention that there has been no confiscation or taking, we revert again to section 4(j) which requires that the 20 acres of appellants' property underwater be filled with "clean non-burnable fill". We

stated in our main brief that we knew of no statute or ordinance which goes as far as Ordinance No. 16, in requiring not only a prohibition of all underwater excavating but in affirmatively requiring (section 4(j)) that the excavation be filled, at the expense of the property owner. Appellee's brief does not dispute our statement about the uniqueness and drastic nature of this affirmative requirement of refilling an excavation covering 20 acres, legally made by appellants over a period of 30 years. In fact appellee has avoided any discussion of section 4(j) except to question appellants' estimated cost of $1,000,000.

With respect to this estimate of $1,000,000, the testimony of appellee's own witness is that 1,000,000 cubic yards have been removed (R. 63) and admittedly section 4(j) requires that these 1,000,000 cubic yards of fill be put back. The estimated cost of $1,000,000 is based on an estimate of $1 per cubic yard as the fair value or cost of "clean, non-burnable fill" (see p. 19 of the *Amicus Curiae* brief which reports $1 per cubic yard as a fair estimate of value or cost of fill).

Appellee does not suggest any other figure of reasonable value or cost of fill but argues that there was no testimony that $1 a cubic yard is a fair estimate of value. Whatever the exact dollar figure be, the proof furnished by appellee's own witness (R. 63) that there are 1,000,000 cubic yards of "clean non-burnable fill" which must be supplied by appellants means that the cost would be *very* substantial. Whether the actual cost be $1,000,000 or half or a quarter of that sum, the requirement that appellants spend the money to supply 1,000,000 cubic yards of fill for an excavation legally made over 30 years, is unreasonable and unconstitutional. The severity, inequity and unconstitutionality of such affirmative requirement of refilling becomes even more apparent, in view of the 1956 judgment

(exhibit 3 of our main brief) which *expressly* held that appellants have the legal rights of "a prior non-conforming use in the conduct of a sand and gravel business which may be carried on on the entire premises" of appellants. Admittedly, 20 acres of appellants' 38 acres are under water. The record contains no evidence of any difference in facts or circumstances surrounding appellants' excavating activities between 1956 (when the judgment was entered, permitting underwater excavation) and 1958 (when Ordinance No. 16 was amended, prohibiting underwater excavation) to justify the requirements of refilling.

The requirement of refilling is so impossible to sustain under appellee's theory of *regulatory* legislation that appellee does not offer any serious argument or justification for the requirement of putting back 1,000,000 cubic yards taken out of the property. Appellee does not dispute the fact that the Ordinance (section 4(j)) makes this requirement. Appellee argues (brief, p. 12) that the judgment does not direct appellants to refill their 20 acres. To the contrary, the judgment does expressly state (R. 14) that the "defendants [appellants] have failed to refill * * * where earth has already been removed" and that this constitutes a "violation of the said Ordinance No. 16" (R. 13).

Since the judgment itself recites (R. 13, 14) that it is a "violation" of the Ordinance not to refill, it is an exercise in casuistry to argue that the requirement of refilling (section 4(j)) is not applicable to appellants because appellee has not yet sought a supplemental court order containing affirmative, mandatory provisions for refilling.* Certain it is that if the judgment below be affirmed, appellee will obtain such order.

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* Section 10 provides criminal sanctions for violations of the Ordinance.

We do not understand appellee's statement (brief, p. 12) that neither the ordinance nor the judgment requires appellants "to refill the entire 20 acre excavation *whether or not* they propose to resume excavating" (emphasis in original). The Ordinance (section 4(j)) provides for refilling "whether or not" appellants "propose to resume excavating". Section 4(j) states unambiguously and unconditionally that "when earth has been removed * * * to the maximum extent allowable under this ordinance * * * such pit shall be *immediately* refilled with clean, non-burnable fill * * *" (emphasis added). The "maximum extent allowable under this ordinance" (section 4(j)) is the "two feet above the maximum ground water level", provided for in section 4(h). Since it is admitted (appellee's brief, p. 3) that appellants' excavation on 20 acres has reached a point where the "average depth" is "25 feet *below* water level", the only possible conclusion is that appellants are required (by section 4(j)) *"immediately"* to refill these 20 acres—without regard to whether appellants "propose to resume excavating" (appellee's brief, p. 12). Furthermore, how can appellants "resume excavating" on these 20 acres under water, in the face of section 4(h) which prohibits all excavating below water level?

POINT II

Ordinance No. 16 is unconstitutional because it is prohibitory of all future excavation activities conducted by appellants over a period of 30 years and because it requires the refilling of an excavation covering 20 acres which, admittedly, was legally created over these 30 years.

Appellee's major legal point is (1) that Ordinance No. 16, as amended in 1958, has a presumption of constitutionality and (2) that that presumption—admittedly (appellee's brief, p. 20) "rebuttable"—has not been overcome. The presumption on which appellee depends is a presumption of regularity or constitutionality of legislation which reasonably *regulates* activities, under the doctrine of police powers. All the cases cited by appellee (pp. 16, 17) in support of the presumption are cases involving *regulation* (see pp. 14-17 *infra*).

Where the alleged regulations become prohibitory and confiscatory then regulation becomes a "taking" prohibited by the due process clause (*Pennsylvania Coal* v. *Mahon*, 260 U. S. 393 and cf. Harlan, *J.* in *U. S.* v. *Central Eureka Mining*, 357 U. S. 155, 182 " • • • regulation which severely diminishes the value of property may constitute a 'taking' " (citing cases, including the *Mahon* case)).

Appellee's contention (brief, p. 23) that Ordinance No. 16 "merely regulates" excavation is factually incorrect. The statement which thereafter follows (brief, p. 23): "Every regulation necessarily prohibits to some degree", overlooks the fact that if it be a true regulation, such regulation also *permits* to some degree. The provisions of sections 4(h) and (j) do *not* permit underwater excavation, to any degree.

In our main brief and again in this reply brief, we have demonstrated (1) that sections 4(h) and (j) of the Ordinance constitute complete prohibition of underwater dredging and excavation, which is the *only* type of excavation engaged in by appellants during their 30 year operation and (2) excavating under water was directly adjudicated in the 1956 litigation to be a "prior non-conforming use" which gave appellants the legal right to "carry on on [their] entire premises". (See Exhibit 3 annexed to our main brief.) No presumption of constitutionality accrues or applies to such confiscatory legislation.* This is recognized by appellee itself which had devoted much of its brief to arguing that sections 4(h) and (j) do *not* prohibit appellants' activities.

If we assume, *arguendo*, that there is a presumption of constitutionality even in the enactment of *prohibitory* legislation, when it is shown that such legislation wipes out vested legal rights of a prior non-conforming use—as we find in this case—then any assumed presumption is overcome; and we reach the same conclusion *viz*: that such legislation constitutes a taking of such vested rights of the prior non-conforming use, and is unconstitutional. *Town of Somers* v. *Camarco*, 308 N. Y. 537 is a direct holding that a non-conforming use of excavating sand and gravel may not be eliminated by town ordinance, without compensation.** This rule of law (considered in our main

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* In the *Reinman, Pierce Oil, Mugler* and other cases cited by appellee (brief, p. 14) which were considered in our main brief (pp. 30-32) prohibition of certain activities were sustained where nuisance was *proved*, not presumed. See *infra*, pp. 24, 25.

** In the September 1961 issue of Western Reserve Law Review (Vol. 12, No. 4), in an article entitled "*Regulation and Removal of Nonconforming Uses*" the author states (p. 695): "The overwhelming majority view in the United States today is that a zoning ordinance which makes no provision for the continuation of a prior non-conforming use is unconstitutional."

brief, pp. 19-24) is actually not disputed by appellee, who argues that the rule is not applicable here because there is no elimination or prohibition of the prior non-conforming use of underwater excavating.

Appellee also argues (brief, pp. 14, 22, 23) that the ordinance prohibiting excavation in the *Camarco* case was labeled a "zoning" ordinance, whereas Ordinance No. 16 is not labeled zoning but is an exercise of "police powers"; from which appellee concludes the "subject ordinance differs" from the ordinance in *Camarco*. We submit that the label of the ordinance which, in both cases, provides for the termination and prohibition of all underwater excavation, is of no significance. The zoning ordinance in the *Camarco* case and the ordinance in issue on this appeal are both bottomed on the doctrine of "police powers".

We previously pointed out that the cases cited by appellee (brief, pp. 16, 17) in support of its argument that there is a presumption of constitutionality of the confiscatory provisions of sections 4(h) and (j) of Ordinance No. 16, are all cases involving true regulation and not prohibition of activities. These cases are therefore not applicable to the issue involved on this appeal. In the first case cited by appellee, *Borden's Farm Products* v. *Baldwin*, 239 U. S. 194, the issue was the regulation and classification of sellers of milk. There was no issue of prohibition in that case.

In *United States* v. *Carolene Products Co.*, 304 U. S. 144, a case involving a statute regulating the sale of milk, the holding was (p. 154): "• • • as the statute is not unconstitutional on its face, the demurrer should have been overruled."

Matter of Wulfsohn v. *Burden*, 241 N. Y. 288 is a zoning case, which appellee cites (p. 16) although appellee argues (brief, pp. 22, 23) that zoning statutes and police power ordinances stem from essentially different sources. In the

Wulfsohn case, the ordinance limited and regulated—not prohibited—the construction of apartment houses.

Appellee also cites (p. 17) *Shepard* v. *Village of Skaneateles*, 300 N. Y. 115, another zoning case, in which Judge Fuld said (p. 118):

> "The zoning regulation • • • may neither deprive an individual owner 'of all beneficial use of his property' *Matter of Eaton* v. *Sweeny*, 257 N. Y. 176, 182-183, nor impose upon him 'a special hardship, unnecessarily and unreasonably' *Dowsey* v. *Village of Kensington*, 257 N. Y. 221, 226."

In *Wiggins* v. *Town of Somers*, 4 N. Y. 2d 215, also cited by appellee (p. 16), there was a limitation or regulation of dumping garbage in the Town of Somers. The plaintiff's business was the collection of garbage and the ordinance, which provided that plaintiff could not collect garbage outside the Town of Somers and bring it into the Town of Somers, was held to be a proper regulation and constitutional. In this case, as in all the other cases cited by appellee, there was no total prohibition such as we find in our case.

Matter of Stubbe v. *Adamson*, 220 N. Y. 459 is another regulation case.

Olsen v. *Nebraska*, 313 U. S. 236 cited by appellee (brief, p. 16) for the proposition that "Questions as to the wisdom, need or appropriateness of the enactment are for the legislative body", is a case upholding legislation which limited and regulated fees of employment agencies to 10%.

Even though appellee admits that the presumption of constitutionality of regulatory legislation is "rebuttable", the fundamental theory of appellee (brief, pp. 16, 17) is that legislation, although prohibiting activities extending over a 30 year period without any proof that such ac-

tivities have become or are evil or noxious, should not be tampered with by the courts. Although appellee stresses and repeats its contention that appellants did not rebut an alleged—but improperly assumed—presumption of constitutionality of confiscatory legislation, appellee gives no indication what the appellants should have done or proved to rebut such alleged presumption. The simple fact that sections 4(h) and (j) make it unlawful and illegal for appellants to excavate under water and require the filling of 20 acres with 1,000,000 cubic yards of fill, is all the proof necessary to overcome any presumption of constitutionality which appellee would apply even to confiscatory legislation.

Appellee also cites (brief, p. 17) *Defiance Milk Products Co.* v. *DuMond*, 309 N. Y. 537 which holds that a presumption of constitutionality of *regulation* of the sale of milk was overcome by the same type of proof involved in our case, to wit: the showing of "an absolute ban" (309 N. Y. at p. 541). The Court in that case stated (p. 541):

> "Appellants argue that plaintiff failed to carry the burden of proof. We do not agree. All plaintiff had to show was that no reasonable basis existed for an absolute ban against evaporated skimmed milk. Since no one has been able to discover any such basis, requisite proof of unconstitutionality was present."

In our case, there is uncontroverted proof (R. 122) that the walls of the excavation are "stable"; there has never "been a cave-in or tearing away of the bank around this pit" (R. 121); there is no proof of any injury to person or property; the entire premises of appellants are completely surrounded by a 6 foot wire fence topped by three strands of barbed wire maintained in good condition (R. 82); there is no proof of a single trespasser in all the years of appellants' operations. We shall consider this lack of any showing of danger or nuisance later in this

brief (Point III); we summarize the testimony at this time to demonstrate how it falls within the *Defiance Milk Products* case, cited by appellee.

Finally we consider *New York Trap Rock Corp.* v. *Clarkstown*, 1 A. D. 2d 890 aff'd 3 N. Y. 2d 844, another zoning case cited by appellee (p. 17), in which we find the following statement (1 A. D. 2d at p. 891).

> "* * * at the time the ordinance was adopted, respondent had no vested right to quarry on parcel 17. It had neither made a substantial investment with a view toward quarrying on said parcel nor made any substantial use of said parcel for such purposes."

The court in the *New York Trap Rock* case cited *Town of Somers* v. *Camarco*, 308 N. Y. 537 and *People* v. *Miller*, 304 N. Y. 105. How different is our case where the investment has been very substantial, where the operations have been continuously carried on for more than 30 years and where we have an express adjudication (Exhibit 3 attached to main brief) that appellants "have made such a substantial investment in improvements in the business to warrant the continuance of [their] non-conforming use. See *People* v. *Miller*, 304 N. Y. 105; *Town of Somers* v. *Camarco*, 308 N. Y. 537".

Appellee also discusses (brief, pp. 18-24) a number of cases, most of which were decided by trial courts, involving ordinances *regulating* sand pits. In the very case (*Town of Huntington* v. *Broad Hollow Estates*, N. Y. L. J. Sept. 17, 1957, p. 12) from which appellee quotes (brief, pp. 18, 19), it is made clear that the court did not pass upon any ordinance or facts comparable to the facts or ordinance (sections 4(h) and 4(j)) involved on this appeal. The court in the *Broad Hollow* case said:

> "Without *regulation*, many sand and gravel pits would become a menace to the public * * *"

We find no fault with the foregoing statement or the holdings in the cases cited by appellee (pp. 18-24) *viz*: that *regulation* of excavating (e.g. fencing, width of berm, degree of slope) is necessary, proper and constitutional. However, these cases do not stand for either of the following propositions argued by appellee:

(1) "This is not a novel situation. Sand pit ordinances in material and substantial part, identical or similar to the one at bar have frequently been before the courts" (appellee's brief p. 18) and

(2) "It is clear that pits like the subject one constitute the kind of dangerous use that may be eliminated" (appellee's brief p. 24).

None of the cases cited by appellee (pp. 18-24) involved either (a) an absolute prohibition of all underwater dredging or (b) the requirement that excavation, legally made, be refilled at a mountainous cost; and none of the cases uphold the principle (brief p. 24) that "pits like the subject one * * * may be eliminated"—without payment to the property owner.

Appellee probably quotes from the opinion in the *Broad Hollow* case (p. 18) because of its *dictum* that "lives of young children have been lost in these *unguarded* sand pits" (emphasis added). Not only is this *dictum*, and not only is there no proof in our case that lives of children—or adults—have been lost on appellants' property, but the *dictum* in the *Broad Hollow* case concerning loss of lives in "*unguarded* sand pits" is certainly not pertinent or applicable to our excavation which is *not* "unguarded", but which is completely surrounded by 7000 feet of 6 foot wire mesh fence, constructed in conformity with the regulatory provisions of Ordinance No. 16.

In addition to sections 4(h) and (j) of the Ordinance which prohibit all underwater excavating and require the refilling of the 20 acres of appellants' property where the water is located, there are other provisions of the Ordinance which go beyond the power of the Town to make reasonable regulations in the excavating industry. Specifically we refer to section 4(c) of Ordinance No. 16, as amended in 1958 (R. 6), which requires that the 6 foot chain link fence which appellants constructed in 1949 (R. 82) be "set on a concrete curb not less than 18 inches in depth". This requirement of an 18 inch concrete base under appellants' fence, extending 7,000 lineal feet, would obviously require that this entire 7,000 feet of fence, which was constructed in accordance with the Ordinance in 1949 (R. 138) before curbing was required, be up-rooted, that the concrete base be put in, and that the fence be placed on top of the concrete. Conceding the fact that reasonable regulations are to be given a presumption of constitutionality, the evidence in this case shows that this regulation is not reasonable. The Town's own employee testified that "practically a whole new fence was constructed around the property" by appellants in 1949 (R. 138), that he inspected this construction (R. 138) and that there was no requirement for a concrete curb at that time (R. 140, 141). There was testimony that the fence has been continuously inspected (R. 84, 123, 126) and the appellee was unable to show any holes in the 7,000 feet of fence. (The most appellee was able to show were two small depressions underneath the fence (R. 63) which the trial court gratuitously—without the support of any testimony—suggested were "evidently dug by children" (R. 179).) The County engineer, testifying for appellee, testified that his department has not installed concrete curbs under the fences maintained by the County which were erected prior to the 18 inch concrete curb requirement, which was enacted in the 1958 amendments to Ordinance No. 16 (R. 135, 136). The

requirements of ripping up the entire fence (7,000 feet) and installing a new concrete base, is oppressive and unwarranted by any evidence in the record. The dissenting opinion of Judge Van Voorhis (R. 205) considers this onerous and oppressive requirement of the concrete curb and concludes:

> "No object in the installation of this concrete curbing has been shown except that it would put defendants [appellants] to the expense of removing the fence, laying the concrete and constructing a new fence. This, [fol. 266a] along with the prohibition of excavation below water level or more than 10 feet below the highway level, and the extension from 10 to 20 feet of the permitted distance between the excavation and the property line and the retrospective requirement of refilling all that had been excavated since 1927, shows that the purpose was expropriation rather than regulation."

POINT III

The contention of appellee that the total prohibition of excavation is constitutional as a proper exercise of police powers is erroneous because there is no proof to support the contention of danger or nuisance. Appellee's resort to "judicial notice" of different fact situations in other excavations is not a substitute for facts or evidence of nuisance or evil in our case, which the Town failed to provide.

As we have seen (Points I and II, *supra*) the main contention of appellee, to avoid the unconstitutionality of Ordinance No. 16, is that the Ordinance does not provide for prohibition, but only regulation of excavation. The majority opinion of the Court of Appeals (R. 200) adopted this contention.

Appellee also argues that even if the Ordinance does provide for prohibition of excavation, the Ordinance is valid as an exercise of the Town's police powers. We noted (our main brief pp. 21, 22) that in *Town of Somers* v. *Camarco*, 308 N. Y. 537, the Court held that a prohibition of the business of excavation, where it constitutes a nonconforming use, is unconstitutional. By way of *dictum* the Court in that case said (p. 541) that if there were proof of "the creation or maintenance of a nuisance on the premises of the defendants" then the situation might be different. There is no proof in our case that there was any "creation or maintenance of a nuisance" in appellants' operations extending over 30 years. At no time did the appellee-Town so contend, although it is obvious from the history of the litigation between the parties that the appellee-Town has been trying for years to eliminate appellants' operations—without paying therefor.

In the 1956 litigation (main brief, exhibits 2 and 3) the Town could have, but did not litigate the question of danger or nuisance in appellants' excavating operations. On this trial, the Town did not show one single instance of trespass, or injury to person or property, or any potential danger, harm or injury to person or property. The testimony with respect to the fencing around the entire property, stability of slopes, no cave-ins or potential cave-ins, was uncontradicted. In sum, there is no proof whatsoever that appellants' operations are dangerous or potentially dangerous or constitute a nuisance.

We noted in our main brief the statement in the dissenting opinion (R. 204) (in which three judges joined) that on the argument in the Court of Appeals, appellee admitted that it "does not contend that this condition [i.e. appellants' excavation] amounts to a nuisance". In its brief (pp. 12, 13) appellee states that "it made no such concession". Appellee's argument (p. 13) that appellants did not "mention" this concession in its "reply argument in the Court of Appeals" is meaningless because there was, in fact, no "reply argument" and, in any event, there was no occasion to comment on a concession made by appellee in open court.

In addition to appellee's admission (R. 204) that appellants' operations do not constitute a nuisance, there are no facts in this record which would support any contention of nuisance. Appellee appears to recognize that this is so because it includes in its brief (p. 6) a story of an alleged drowning, on the excuse that appellants stated in their prior briefs that the record does not show any "loss of life or property on appellants' premises". Actually, appellants' statement is correct; the record does *not* contain any proof of "loss of life or property on appellants' premises". And actually appellants do not know whether even the one drowning discussed by appellee took place. It is not in the

record in this case and appellants have no personal knowledge thereof. Accordingly, we do not know how this Court would be able to take "judicial notice" of a "fact" about which there is, at least, a factual question. Furthermore, as appellee admits (brief, p. 7), the one alleged drowning is "inconsequential" and would not be sufficient to sustain the validity of Ordinance No. 16.

Secondly, with respect to alleged drownings in "pits like the subject one" (appellee, brief p. 6) such statement of counsel constitutes no proof and no substitute for proof of nuisance or danger in our case because the record does not contain any such facts and we don't know (and it certainly is not a subject matter of judicial knowledge) (a) whether there were drownings, (b) the circumstances of such alleged drownings, and (c) whether "other pits" were, in fact, "like" the excavation in our case. As a matter of fact, the *dictum* of the *Broad Hollow* case, quoted in appellee's brief (p. 18), *re* "loss of lives in pits," expressly speaks of "*unguarded* sand pits"—which are *not* "like" ours. In any event, what may have happened "in other pits", under circumstances not revealed in our record on appeal, is of no pertinency to the issue of danger or nuisance in appellants' operations.

Although appellee expressly states that it does not contend that the excavating business "is evil *per se*" (brief, p. 11), nevertheless throughout its entire brief it tries to paint a picture of awe, danger, or evil in describing the man-made lake as a "sprawling 20 acre crater" (brief pp. 1, 2). And appellee gratuitously suggests that Ordinance No. 16 "was inspired by the commonly known appalling statistics of children's drownings in such pits" (brief p. 2), although there is not a single instance in our record of any drownings in this pit or any other pit like ours. Appellee also presents a new suggestion, not raised

in the courts below, that the Ordinance was "intended to protect against possible pollution of the local water supply" (brief p. 2), although there is no evidence in the record on any issue of pollution of any water supply.*

Not only does appellee try to make up for its lack of proof of nuisance by discussing alleged "other pits" (which are *not* subject to judicial notice) but it seemingly takes the position that the burden of proof of showing such nuisance was on the appellants. In taking this position, appellee mistakenly relies on the presumption of constitutionality of regulatory legislation. That rule would not put the burden on appellants of proving that their activities constituted a nuisance in order to sustain the constitutionality of the Ordinance. Certainly appellants do not have to prove that there is no nuisance. Actually, the fact that there were no injuries to person or property, no trespassers, no potential danger to person or property, the complete fencing of appellants' property—all this demonstrates: no nuisance.

After appellants demonstrated the unconstitutionality of the Ordinance because it prohibits all future excavation and requires refilling of the excavation—thereby eliminating appellants' adjudicated rights of their non-conforming use—then if the Town wanted to sustain the legislation on the theory of nuisance, the Town would have to prove such

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* As we pointed out in our main brief (p. 35) and appellee does not deny in its brief: appellee's representatives discussed with appellants the possibility of condemning appellants' property for use in appellee's plans of drainage. Paying for appellants' property *via* condemnation would be the "constitutional way" (*Pennsylvania Coal* v. *Mahon*, 260 U. S. at p. 416) of acquiring appellants' property for the public purpose of drainage or protection against "possible pollution" (appellee's brief, p. 2). Taking appellants' property, without payment, is not the "constitutional way".

nuisance, as suggested in *Town of Somers* v. *Camarco*, 308 N. Y. at p. 541.

After stating its main contention that the Ordinance "is not an absolute prohibition but merely a regulatory enactment" (appellee's brief, p. 14), appellee makes its second contention that even if Ordinance No. 16 does constitute a prohibition of future excavation, the Ordinance would "nonetheless be constitutional because of the seriousness of the evil against which it is directed". However, appellee did not prove any "seriousness of the [alleged] evil". In support of its contention, appellee cites: *Reinman* v. *City of Little Rock*, 237 U. S. 171; *Pierce Oil Corp.* v. *Hope*, 248 U. S. 498; *Mugler* v. *Kansas*, 123 U. S. 623; *Powell* v. *Pennsylvania*, 127 U. S. 678; and *U. S.* v. *Central Eureka Mining Co.*, 357 U. S. 155.

The foregoing cases, which we considered in our main brief (pp. 30-32), do not support a holding of constitutionality of the confiscatory provisions of Ordinance No. 16 because in each of those cases, the evil or nuisance involved in the conduct of the business which was prohibited (a stable, storage of oil, making of distilled liquors, the production of oleomargarine) was *factually* proven—in most cases, in the pleadings themselves.* (See our main brief, pp. 30, 31.)

In the *Reinman* case, the stables were, on the pleadings, admitted to be "productive of disease". In the *Pierce Oil*

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* In the recent dissertation on "*Regulation* and *Removal* of Nonconforming Uses" (12 Western Reserve Law Review at p. 699) the author states: "It is clear that an activity cannot simply be declared by ordinance to be a nuisance and its removal thereby compelled" (citing cases). See also 11 Baylor Law Review 306, 310, 311: ". . . a municipal corporation cannot, under its police power to abate nuisances, suppress in toto or in part any legitimate business, trade, or profession which is not a nuisance *in fact*." (Emphasis added.)

case the pleadings admitted that the storage of gasoline, in the circumstances in that case, was dangerous.

In the *Mugler* case, this Court noted that "a public nuisance" was involved (123 U. S. at p. 662). The appellee in our case does not contend that the record* proves that appellants' operations constitute a "public nuisance". Although appellee now disputes the concession it made on the argument in the Court of Appeals that appellants' operations do *not* constitute a nuisance, the fact remains that there are no facts in our case which would support any finding of nuisance to justify the total elimination of excavating underwater and the requirement of filling 20 acres, after 30 years of admittedly legal operations.

Accordingly, the foregoing cases, involving nuisance, where total prohibition has been permitted (cases described by Mr. Justice Douglas in the *Saxl* case, 328 U. S. 80, 83 as "extreme cases") are inapplicable in the case on appeal where, to the contrary, appellants' operations are not shown to be dangerous or to constitute a nuisance. In the article in 12 Western Reserve Law Review, *op. cit. supra*, at p. 699, it is stated:

> "* * * a municipality cannot completely prohibit a legal business merely by calling it a nuisance. See Simon v. City of Cleveland Heights, 46 Ohio App. 234, 188 N. E. 308 (1933); Wolarz v. Village of Cuyahoga Heights, 53 Ohio App. 161, 4 N. E. 2d 400 (1936). *A fortiori*, a legal, existing nonconforming use could not be terminated merely by classifying it as a nuisance."

In *Wolarz* v. *Village of Cuyahoga Heights*, 53 Ohio App. 161, the ordinance was, as in our case, enacted under "police

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* Appellee relies on "judicial knowledge" which we discussed, *supra*. See also Point I of brief of *Amicus Curiae* in this case on appeal.

powers" as an "emergency amendment to existing ordinances" and prohibited the maintenance of coal yards within a few hundred feet of food factories. As we have seen, the appellee in our case tries to make much of the fact (appellee brief, pp. 14, 22, 23) that Ordinance No. 16 is not a zoning ordinance but is a "police power" ordinance and thereby appellee seeks to distinguish the holding in *Town of Somers* v. *Camarco*, 308 N. Y. 537. In the *Wolarz* case, where the ordinance was labelled a "police power" regulation of a business located properly in a zoned area, the Court of Appeals of Ohio held the ordinance unconstitutional, as a deprivation of property without due process. The ordinance itself stated that it was enacted as "an emergency measure by reason of the subject matter [in] the immediate preservation of the public health and safety • • •". This declaration of the purpose of the ordinance was held insufficient to sustain the ordinance, which prohibited the carrying on of the coal business, the Court stating (53 Ohio App. at p. 164):

> "There is no doubt that the council of those municipalities may impose reasonable regulations as to the manner in which coal yards shall be operated and conducted so as to prevent the coal yards from becoming a nuisance in point of fact. But the council • • • has no power to prohibit the operation of coal yards on the theory that the same constitutes a nuisance per se."

The Court quoted from *First Avenue Coal* v. *Johnson*, 171 Ala. 470:

> "The constitutional right of the citizen cannot be abridged or destroyed under the guise of police regulations. The legislature therefore, cannot, by its mere *ipse dixit*, make that a nuisance which is not in fact or truth a nuisance, or akin thereto."

Furthermore, with respect to the "extreme cases" (where prohibition of activities is upheld, where nuisance is *proved* cf. *Reinman, Pierce, Mugler*) we again point out that the prohibition of extraction of minerals from the earth (section 4(h) of Ordinance No. 16) is a prohibition of the use of one's own land, as contrasted with the prohibition of a business located on the land, which can be moved elsewhere. This distinction was recognized by this Court in *Hadacheck* v. *Los Angeles*, 239 U. S. 394, 410-412 which we considered in our main brief (pp. 23, 24). In the situation where a noxious business is prohibited (e.g. the stables in *Reinman*) only a limitation results in the use of the real property which may be thereafter used for other purposes than the proscribed business or activities. However, when, as in our case, the very use of the real property *qua* real property is prohibited, i.e., where there is a prohibition of removal of the mineral content of the land itself, then there is indeed a total elimination of all uses of the real property itself. We ask this Court to consider also the brief of *Amicus Curiae* (pp. 22-26) which discusses this aspect of the appeal at greater length.

Finally, with respect to such cases as *Reinman* and *Pierce Oil* and *Mugler*, we note that all of these cases were considered and cited in the dissenting opinion (one judge) in *Pennsylvania Coal* v. *Mahon*, 260 U. S. 393. However, the majority opinion in that case found the Pennsylvania statute, prohibiting mining under houses and buildings, to be unconstitutional as a "taking", this Court pointing out that it might very well be that mining under the houses would be dangerous (as *expressly* stated by the Pennsylvania legislature) but that the "constitutional way" of eliminating the legal rights of such excavation was by "the exercise of eminent domain" (260 U. S. at 413). We have examined all subsequent reported cases citing *Pennsylvania Coal* v. *Mahon*, and we do not find that the principle stated there-

in has been altered or watered down whatsoever. It is noteworthy that the 30 page brief of appellee cites the *Mahon* most casually (pp. 16, 20), contains no analysis of that case and no answer to the detailed analysis of that case found in our main brief (pp. 10, 13, 16, 20, 33, 34).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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